United States Department of Labor
Employees' Compensation Appeals Board

BRYAN D. FUTCH, Appellant	)	
and	)	**Docket No. 04-859**
	)	**Issued: June 24, 2004**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Englewood, CO, Employer	)	

Appearances:
Bryan D. Futch, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 13, 2004 appellant filed a timely appeal of the September 25, 2003 nonmerit decision of the Office of Workers' Compensation Programs, denying his June 25, 2003 request for reconsideration. He also timely appealed the Office's June 16, 2003 decision, which denied his claim for a January 27, 2003 traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.[1]

ISSUES

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on January 27, 2003; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The record on appeal includes evidence that was received by the Office after the issuance of its most recent decision dated September 25, 2003. The Board's review is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On January 29, 2003 appellant, a 41-year-old correctional officer, filed a traumatic injury claim (Form CA-1), alleging that he injured his left shoulder, chest, back and neck while in the performance of duty on January 27, 2003. He stated that he injured himself while practicing blocks and thrusts with batons and practicing other formations and movements involving jabs and overhead thrusts. The injury allegedly occurred in the parking lot at the employing establishment training facility. Appellant did not stop working after his alleged injury and he reportedly sought treatment at the employing establishment health services facility on January 28, 2003. He did not initially submit any medical documentation with his claim. The Office subsequently received an undated request from Dr. Peter L. Weingarten, a Board-certified orthopedic surgeon, for a left shoulder magnetic resonance imaging (MRI) scan, which was tentatively scheduled for April 16, 2003. The stated purpose of the MRI scan referral was to rule out a rotator cuff tear.

On April 18, 2003 the Office advised appellant of the need for additional factual and medical evidence. The Office noted that the record did not include a diagnosis of any condition resulting from the alleged injury. The Office afforded appellant 30 days within which to submit the requested factual and medical information. Additionally, the Office authorized the requested left shoulder MRI scan.

In a decision dated June 16, 2003, the Office denied appellant's claim on the basis that he failed to establish fact of injury. The Office explained that the record was insufficient to establish that the employment incident occurred as alleged. Additionally, the Office noted that the record was devoid of any medical evidence that provided a diagnosis attributable to the claimed event.

On June 25, 2003 appellant requested reconsideration. He acknowledged that he had not provided the necessary evidence. Appellant explained that on April 9, 2003 he had an appointment with Dr. Weingarten, who obtained an x-ray and advised him that it appeared he had damaged his rotator cuff. He stated that Dr. Weingarten recommended an MRI and sought the Office's approval. Additionally, appellant indicated that he received acupuncture treatments because his pain was so bad.

On June 30, 2003 the Office received Dr. Weingarten's April 9, 2003 treatment records. He reported that appellant was first injured in January 2002, when he sustained a distal biceps tendon rupture which was treated nonsurgically. Dr. Weingarten reported that appellant continued to complain of weakness and discomfort in the arm and in January 2003, he was again injured; this time while practicing with a baton. Since then appellant reportedly complained of pain about the left shoulder and weakness in the arm. Dr. Weingarten also reported some pain in the intrascapular and trapezius area. On physical examination he noted evidence of an old distal biceps tendon rupture and moderate weakness about the shoulder. Dr. Weingarten also noted there was a positive impingement sign. X-rays of the shoulder revealed mild sclerosis adjacent to the greater tuberosity. Dr. Weingarten impression was "[r]ule out rotator cuff tear." He recommended an MRI scan of the shoulder and further suggested consideration of an additional MRI scan of the elbow to ascertain the nature of the distal biceps rupture.

In a decision dated September 25, 2003, the Office denied appellant's request for reconsideration, finding that the request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury.[3] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[4]

ANALYSIS -- ISSUE 1

In his January 29, 2003 Form CA-1, appellant alleged that he injured himself on January 27, 2003 while practicing blocks and thrusts with batons and practicing other formations and movements involving jabs and overhead thrusts. The employing establishment did not take issue with appellant's account of the January 27, 2003 training exercise. While the record may support that he actually experienced the employment incident that is alleged to have occurred on January 27, 2003 the medical evidence does not establish that the alleged employment incident caused a personal injury. When the Office reviewed the claim on the merits, the only available medical evidence was an undated request for a left shoulder MRI scan. Dr. Weingarten, who requested the MRI scan indicated that the purpose was to rule out a rotator cuff tear. He did not otherwise provide a specific diagnosis, nor did he identify a cause of injury. Furthermore, Dr. Weingarten did not identify a date of injury or provide history of injury. The record, at the time the Office issued its June 16, 2003 merit decision, did not include a rationalized medical opinion specifically diagnosing a condition attributable to appellant's alleged January 27, 2003 employment incident. As such, the Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new

---

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *John J. Carlone*, 41 ECAB 354 (1989).

[4] *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

evidence not previously considered by the Office.[5] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

ANALYSIS -- ISSUE 2

Appellant's June 25, 2003 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[7]

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted Dr. Weingarten's April 9, 2003 treatment notes. While this particular document was not previously of record his April 9, 2003 treatment records are no more enlightening than his previously submitted request for a left shoulder MRI scan. Neither the treatment notes, nor the MRI scan referral provide a specific diagnosis. In both documents Dr. Weingarten's stated objective was to rule out a rotator cuff tear. Although the April 9, 2003 treatment notes included considerably more detail than what had previously been provided, the notes do not include a specific diagnosis attributable to appellant's alleged employment incident of January 27, 2003. Consequently, this evidence is not relevant to the issue on reconsideration. Inasmuch as appellant did not submit any "relevant and pertinent new evidence," he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[8]

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied his June 25, 2003 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on January 27, 2003. The Board further finds that the Office properly denied his June 25, 2003 request for reconsideration.

[5] 20 C.F.R. § 10.606(b)(2) (1999).

[6] 20 C.F.R. § 10.608(b) (1999).

[7] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii) (1999).

[8] 20 C.F.R. § 10.608(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 25 and June 16, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member